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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WM. M. GREENE,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

CHARLES P. TAFT,
Counsel for Petitioners.

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vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioners, Industrial Trust Company, a banking croporation under the laws of the State of Rhode Island, and Orland S. Greene, a citizen of the United States, as executors of the Estate of William M. Greene, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on February 4, 1935.

Judgment Below.

The judgment of the Court of Claims was under date of February 4, 1935. Motion for a new trial was filed March 13, 1935, and was overruled on April 8, 1935.

Questions Presented.

Whether the provisions of Section 302 (c), (g) or (h) of the Revenue Act of 1926 (44 Stat. 9, 70, 71) apply or may be constitutionally applied in the case of a policy of insurance taken out by the decedent upon his own life which became a paid-up policy on March 4, 1912, where it was payable to his wife for her sole use, if living, and, if not living, to his surviving children, or their guardian, for their use, or if there were no children surviving, then to his executors, administrators or assigns, the wife having predeceased him and three children having survived him.

Statutes and Constitutional Provisions Involved.

The pertinent provisions of the Revenue Act of 1926 (44 Stat. 9, 70, 71) read as follows:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. • • •
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> • • • • • • •
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. • • •

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

The provision of the Constitution which plaintiffs claim is applicable is the Fifth Amendment:

"No person • • • shall be deprived of • • • property, without due process of law."

Statement.

The facts are not in dispute and were stipulated in the Court of Claims. Plaintiffs, as executors of the estate of William M. Greene, deceased, who died on May 30, 1930, a citizen and resident of Rhode Island, included in his gross estate the proceeds of certain life insurance policies against which there applied the credit of $40,000.00 authorized by Section 302 (g) of the Revenue Act of 1926. They did not include the proceeds of the Equitable Life Assurance Society policy involved in this case. It was a tontine policy originally for $50,000.00 taken out on March 2, 1892. On February 19, 1912, William M. Greene surrendered it for its value in paid-up insurance. On March 4, 1912, endorsement was stamped on the policy reciting that since the premium due March 2, 1912, had not been paid, it was agreed and declared that in accordance with the wish of the assurant the policy had become a paid-up policy for $42,000.00 without profits or participation in dividends and requiring no further payments. The policy was payable to the wife of the decedent, if living, and if not living, to the surviving children of the decedent, or if there were no such children surviving him, to the executors, administrators and assigns

of the decedent. His wife did predecease him and the proceeds of the policy after his death were paid to his three children.

In the final audit and determination, the Commissioner of Internal Revenue did include the proceeds of this policy in the estate. A closing agreement was entered into with reference to the tax liability of the estate, and was duly approved by the Under Secretary of the Treasury. It contained the following clause:

> "Whereas said taxpayer agrees to this determination, reserving, subject to statutory limitations, the right to file a claim for refund as to the tax involved in the inclusion of the $42,000.00 Equitable Life Assurance Company of the United States policy in the gross estate."

The petitioners filed evidence of the payment to the State of Rhode Island of eighty per cent of the tax shown to be due by the final audit (including by reason of this policy the sum of $3,024.00), and duly filed with the Collector of Internal Revenue for the District of Rhode Island their claim for a refund of $756.00, representing the excess of the taxes paid to the United States over the correct tax due if the proceeds of the policy should not have been included in the estate. The claim for refund was based upon the statement that:

(1) The beneficiary was not the estate of the insured.

(2) The decedent had no right to change the beneficiary.

(3) Decedent had no right to borrow money on the policy.

(4) The decedent could not receive the cash surrender value of the policy.

It was further contended that the fact that the policy was payable to the insured's estate in the event of the prior

death of the beneficiaries did not make the policy taxable. The claim for refund was rejected by the Commissioner of Internal Revenue on August 23, 1933. This suit was filed on September 25, 1933. It was argued before the Court of Claims on the 8th of May, 1934.

Rulings of the Court Below.

The Court of Claims held that this policy was included within the language of Section 302 (*g*) *of the Revenue Act of* 1926. It conceded the possibility that a life insurance policy absolutely assigned or made payable to a beneficiary, his executors, administrators or assigns, would not constitute a part of the gross estate of the insured under that section. It distinguished the present case on the ground that "the decedent did not divest himself (his estate) of all beneficial interest in the proceeds of insurance payable upon the policy, and his interest therein was not extinguished until his death. No absolute right was acquired by the beneficiary during the life time of the insured to the proceeds of the insurance. Such right was contingent upon the prior death of the decedent. • • • We think it cannot be successfully contended that these contingencies were so remote as to take the case outside of the provisions of the statute, for we cannot speculate upon whether a beneficiary will outlive the insured." (Citing *Klein* v. *United States* (1931), 283 U. S. 231.) It refused to concur in the decision of the Board of Tax Appeals in *Parker* v. *Commissioner* (1934), 30 B. T. A. 342, and the decision of the United States District Court for the Western District of Kentucky, in *Ballard* v. *Helburn* (1934, W. D. Ky.), 9 F. Supp. 812, which it conceded were to the contrary.

The court next held that the inclusion of the policy within the terms of Section 302 (*g*) *of the Revenue Act of* 1926 *did not violate the due process clause of the Fifth Amendment to the Constitution*, for the same reason, namely, that

the title to the proceeds of the policy had not completely vested prior to the death of the decedent, and that the inclusion of the proceeds in the estate did not measure the tax by the inclusion of the property of another. (Citing *Knowlton* v. *Moore* (1900), 178 U. S. 41; *Tyler* v. *United States* (1930), 281 U. S. 497; *Klein* v. *United States* (1931), 283 U. S. 231.) The court distinguished the case of *Central National Bank* v. *Hume* (1888), 128 U. S. 195, on the ground that the policy there was payable to the beneficiaries named, their heirs, executors or administrators, whereas in this case the policy was not so payable. The court also distinguished the case of *McCormick* v. *Burnet* (1931), 283 U. S. 784, on the ground that in that case "there was likewise no contingent reversion to the donor. • • • Under the terms of the trust the corpus could never be returned to the donor upon the death of any beneficiary."

Reasons for Granting the Petition.

1. *The question involved in this case is one of great public and general interest.* It is in substance the question of whether property of a person, whether in a trust or in an insurance policy, as to which a contingent remainder or a possibility of reverter belongs to a second person and is terminated by his death, may be taxed at its full value as a part of the estate of the second person. This was a question involved in the case of *McCormick* v. *Burnet* (1931), 283 U. S. 784, and in *Helvering* v. *Duke* (1933), 290 U. S. 591. While we believe that the issue has been settled by those cases, the Commissioner of Internal Revenue is refusing to accept that position, and is including in the gross estate of all decedents every trust and every insurance policy in which the decedent had a contingent remainder or a possibility of a reverter. See Regulations 80, Article 25:

"The decedent possesses a legal incident of ownership if the rights of the beneficiaries to receive the proceeds are conditioned upon the beneficiaries surviving the decedent."

2. *The courts of the United States are in conflict* on this question. Judge Dawson, in *Ballard* v. *Helburn* (1934, W. D. Ky.) 9 F. Supp. 812, decided that a policy payable to the decedent's wife, if living, otherwise his daughter, if living, and if not then the estate of the insured, could not properly be included in his estate. This case is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and has been passed for argument until the fall. The United States Board of Tax Appeals held in *Parker* v. *Commissioner* (1934), 30 B. T. A. 342, that the proceeds of a policy payable in case of the prior death of the beneficiary to the executors, administrators and assigns of the insured, should not be included in the gross estate.

The Court of Claims in this case has refused to follow these decisions although it concedes they are in point. The Circuit Court of Appeals for the First Circuit has since that time decided the question the same way, but without discussing the issue. *U. S.* v. *Bingham* (1935, C. C. A. 1), 76 F. 2d 573, reversing 7 F. Supp. 907. A petition for certiorari in the *Bingham* case is pending in this Court.

3. *This is an important question of Federal law which should be settled by decision of the Supreme Court.* This Court has recognized the importance of the question as applied to trusts by granting certiorari in the case of *Helvering* v. *St. Louis Union Trust Company*, No. 879, October Term, 1934 (May 20, 1935).

The court has not passed upon the question as applied to insurance policies. It should do so at the same time as in

the case of trusts by granting this petition and the petition in the case of *Bingham* v. *United States*, No. 83, October Term, 1935, filed May 29, 1935.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

CHARLES P. TAFT,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

One opinion was delivered by the Court of Claims. It was written by Judge Littleton and filed February 4, 1935. It appears at p. 18 of the record and is reported in 9 F. Supp. 817.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U. S. C. A., § 288).

The judgment of the Court of Claims was entered on February 4, 1935. Motion for new trial was filed March 13, 1935, and was overruled on April 8, 1935. (R. 29.) The petition was filed on July 3, 1935.

The Facts.

The facts are stated in the petition, page 3. We emphasize only a few points.

In the first place the policy was surrendered and became paid up in March, 1912, and no further payments could be called for, nor were any made by the decedent between that date and the date of his death, May 30, 1930.

In the second place, this surrender left the decedent with no further interest in the policy except a possibility of reverter. He could not change the beneficiaries or borrow on it, there was nothing more he could surrender, and no claim could be made by him on the company with reference to it.

In the third place, the possibility of reverter was a very remote one and so remote as to be really insubstantial in

the highly practical field of taxation. It appears that Mr. Greene was at least sixty when he died and left three children living. The possibility of reverter therefore involved the prior death of three persons, all at least twenty years younger than the decedent. Such a possibility of reverter could not as a matter of judicial notice be estimated, just before Mr. Greene's death, as having any value at all, or at most a very small fraction of the face value of the policy.

ARGUMENT.

Summary.

I. The policy and its proceeds were property belonging, not to the decedent or after his death to his estate, but to the beneficiaries from the date of its surrender in 1912.

II. The reservation by the decedent of a remote interest if he should survive his wife and all three of his children did not prevent the vesting in 1912 of the complete interest of the beneficiaries.

III. The Revenue Act of 1926 does not apply to policies owned by beneficiaries before it went into effect.

IV. The Revenue Act of 1926 cannot constitutionally apply to interests vested in others before it became effective.

V. The transaction of March 2, 1912, was not a gratuitous contingent transfer by the decedent to the beneficiaries intended to take effect in possession or enjoyment at his death.

VI. This transaction was not testamentary in character.

VII. The possibility of reverter or contingent reversion was unsubstantial and the measure of the tax could only be its actual value, not the face value of the policy belonging to others.

I. Policy belonged, not to decedent, but to beneficiaries.

This was a tontine policy which gave to Mr. Greene upon the expiration of the tontine period, March 2, 1912, the choice of six methods of settlement. He chose to surrender the policy and take paid-up insurance. It is settled law by decision or statute in every state, that the rights of the beneficiaries thereupon became absolute unless he specifically retained the right to change the beneficiaries, or withheld some other interest in the policy. This he did not do. The rights of the beneficiaries thereafter could not be defeated by any act of the insured or the insurer. Vance, Insurance (2d Ed., 1930) 541.

We quote from Vance, page 542:

> "With the absolute exception of Wisconsin, it is fully established in all of the states of the American Union that the rights of the person unconditionally designated as the recipient of the money payable under a contract of old line life insurance are vested. The meaning of this somewhat uncertain term as used in this connection is that the beneficiary so designated has a present right, subject to no condition precedent, or contingency, to receive, whenever and however the policy matures, whatever sum may become payable in accordance with its terms, with consequent immunity from any unauthorized interference with that right by the insured or the insurer * * * Hence it follows quite logically that neither the insured nor the insurer, nor both conjointly, can by any act not expressly stipulated for in the contract defeat his right."

This position has been sustained by this Court in the familiar case of *Central National Bank* v. *Hume* (1888), 128 U. S. 195.

> "It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued to the person or persons named in it, to the

beneficiary or beneficiaries, and there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." 128 U. S. 195, 206.

See also 37 C. J. 577; 14 R. C. L. 1376; 7 Cooley, *Briefs on Insurance* (2d Ed.) 6399. Unless the right were specifically granted, he could not borrow on the policy or surrender it except for the beneficiaries' benefit. *Ricker* v. *Charter Oak Life Ins. Co.* (1880), 27 Minn. 193, 6 N. W. 771, 38 Am. R. 289.

There is no doubt that if the right to change the beneficiary is reserved by the insured, the proceeds may be taxed as part of his estate. *Chase National Bank* v. *United States* (1929), 278 U. S. 327. It has now been held that this may be done even though the policies were taken out before the date of the Act. *Levy* v. *Commissioners* (1933, C. C. A. 2) 65 F. 2d, 412.

It is also held that even though the right to change the beneficiary is not reserved, but a surrender for cash is permitted, or loans which will wipe out the interest of the beneficiaries, the proceeds may also be taxed. *Sampson* v. *United States* (1932, D. Mass.) 1 F. Supp. 95.

In the case at bar, however, there is not only no right reserved to change the beneficiaries, but there is no grant of a right to borrow on the policy, or of a right to surrender it again.

The law of New York governs the construction of this policy. Mr. Greene was a resident of Rhode Island at his death. The policy refers to the fact that the insurance company had its office in New York and the policy was payable there. The usual rule would refer to the law of the state where the policy was delivered and the first premium paid, but there is no evidence about that, except that Mr. Greene died a resident of Rhode Island. See *Northwestern Mutual* v. *McCue* (1912), 223 U. S. 234.

However, the courts of Rhode Island in circumstances like these refer to the law of the state where the contract was to be performed, that is, New York. *Re Peckham* (1908), 29 R. I. 250, 69 Atl. 1002, 132 A. S. R. 813.

In addition the language of the policy itself bears out the view that the parties had the New York law in mind. The beneficiary clause, "to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the Statute, and, if not living, to the surviving children", obviously refers to section 52 of the Domestic Relations Law of New York. One of the many cases construing this statute involves a policy of a different New York company in which the language of the beneficiary clause is identical with the above. See *Bradshaw* v. *Mutual Life Ins. Co. of N. Y.* (1912), 205 N. Y. 467, 98 N. E. 851.

Under the New York law there is no possible doubt since *Whitehead* v. *N. Y. Life* (1886), 102 N. Y. 143, 6 N. E. 267, that the general rule applies. See *Levy* v. *Commissioner* (1933, C. C. A. 2), 65 F. 2d. 412. But the Court of Claims sought to distinguish this case because the insured did not completely divest himself of all contingent beneficial interest.

II. The reservation by the decedent of a remote interest did not prevent the vesting in 1912 of the complete interest of the beneficiaries.

The language of the beneficiary clause above referred to, though conditional in form, with a remainder over, established a vested interest in the wife when the policy became paid up in 1912, and the policy belonged to her absolutely as long as she lived. The New York courts have frequently passed upon the question and have left no possible doubt. *Whitehead* v. *New York Life* (1886), 102 N. Y. 143, 6 N. E. 267; *Bradshaw* v. *Mutual Life Ins. Co.* (1912), 205 N. Y. 467, 98 N. E. 851; *Chatham Phenix Nat. Bank* v.

Crosney (1929), 251 N. Y. 189, 167 N. E. 217; *Anderson* v. *Northwestern Mut.* (1933), 261 N. Y. 450, 185 N. E. 696. In the latter case the husband borrowed on a policy payable to the wife if living, otherwise to the husband's estate. The statute permitted the "owner" to borrow, and the court held the wife was the owner.

It is impossible to interpret the language of Mr. Greene's policy as if it read:

> "to the wife, the children, or the decedent, depending upon which survived the others,"

as the Government asserted and the Court of Claims held in effect. The parties might have so stated, but that language was not chosen, and instead the language was chosen which, under the controlling decisions, gave the wife an absolute vested interest and upon her death gave the same kind of interest to the children, subject of course to a condition subsequent. If the interpretation of the Court of Claims were correct, then the death of one of the three children and the death of the mother, followed by the death of the insured with two of the children surviving, would have given the proceeds of the policy to the two surviving children. However, such is not the rule. In *Re Peckham* (1908), 29 R. I. 250, 69 Atl. 1002, 132 A. S. R. 813, the policy was payable to the wife, or, in the event of her prior death, to their children. The wife died first, without issue. It was held in spite of the contingent language, that the proceeds went to the executors of the wife. The court said: "Celia S. Peckham took a vested interest in the policy subject to the condition consequent of her death before her husband, leaving issue."

See also Vance, *Insurance* (2d Ed. 1930) 581, and cases cited, especially *Continental Life Ins. Co.* v. *Palmer* (1875), 42 Conn. 60, 19 Am. R. 530; *Pape* v. *Pape* (1918), 67 Ind. App. 153, 119 N. E. 11; *Fidelity Trust Co.* v. *Marshall* (1904), 178 N. Y. 468, 71 N. E. 8.

This general rule was followed by this Court in *Central Bank* v. *Hume* (1888), 128 U. S. 195. The policy was payable to the wife of the insured, her executors, administrators and assigns. The Court of Claims distinguished the case because the legal representatives of the wife were named. The difference is quite immaterial. In that very case if the wife and children had died intestate without issue before the insured, the proceeds of the policies would have gone eventually, in whole or in part, to the estate of the insured. The only real difference is that the form chosen by Mr. Greene avoided the necessity of having the proceeds pass through two estates. This so-called distinction is not supported in any case or text book, so far as we can find.

The same kind of question has arisen when creditors have sought to include life insurance in the assets of a bankrupt. The courts have held in such cases that only the actual cash value to the bankrupt may be brought in, not the value belonging to the beneficiaries, though there may be a possibility of reverter to the bankrupt. *In re Schaefer* (1910, N. D. Ohio), 189 F. 187; *In re Majors* (1917, D. Ore.), 241 F. 538; *In re Simmons & Griffin* (1919, C. C. A. 1), 255 F. 521.

> "Consistently with the settled rule that a person absolutely designated as beneficiary in a policy to receive money payable thereon has an indefensible vested interest therein, it has been universally held that the insured's trustee in bankruptcy has no interest in such policies. The same rule is applied even though by the terms of the policy the right of the beneficiary depends upon her surviving the insured; and even though, in case of endowment policies, the beneficiary's right to receive payment is contingent upon the insured's dying before the expiration of the endowment term." Vance, *Insurance* (2d Ed., 1930), 632.

In *Re Simmons & Griffin* (1919, C. C. A. 1), 255 F. 521, the bankrupt had a 20-year endowment policy payable in case of his death during the 20-year period to his wife. She was called the contingent beneficiary, but it was held that her interest in the policy was such that the policy could not be surrendered without her consent, and that the surrender value was not an asset in bankruptcy. The court cited *Central National Bank* v. *Hume*, above cited.

The question then is whether this general rule governs when an insurance policy of this character is sought to be brought into the estate under the Revenue Acts. As previously stated the question has been carefully considered in several cases and decided in the way for which we contend. *Ballard* v. *Helburn* (1934, W. D. Ky.) 9 F. Supp. 812; *Parker* v. *Commissioner* (1934), 30 B. T. A. 342. We stand upon the excellent reasoning of these cases.

On the other hand, in *U. S.* v. *Bingham* (1935, C. C. A. 1) 76 F. 2d. 573, without discussing the language of the policy, the rights reserved by the insured or the vesting of the wife's interest, the Circuit Court of Appeals decided this issue to the contrary. All that appears from its opinion is that there were four Berkshire policies payable to the wife of the insured if she survived her husband. It is only from an examination of Judge Brewster's opinion in the District Court that we find the insured could surrender three of the four policies for cash. See 7 F. Supp. 907. Judge Brewster decided that the language of the policies was immaterial because they were taken out before 1918, and that the holding in *Lewellyn* v. *Frick* (1925), 268 U. S. 238, exempted them from the Revenue Act. The reviewing court held that the 1918 Act did apply to policies taken out before it became effective, and included all four. That holding is not inconsistent as applied to three, but as to the one where there was no right to change the beneficiary or

to receive the surrender value, the language of the policy may have been such as to make the case an authority against us.

III. The Revenue Act of 1926 does not apply to policies owned by the beneficiaries before the preceding acts went into effect.

The statute includes in the gross estate "all property • • • (g) • • • to the extent of the excess over $40,000.00 of the amount receivable by all other beneficiaries". "Property" must clearly mean the property of the decedent, not the property of some one else. This necessarily limits the meaning of subsection (g) which therefore cannot apply to a policy belonging absolutely to someone other than the decedent. Congress did not add to or modify this meaning by the enactment of subsection (h). This is a reasonable interpretation, which the Court of Claims adopted itself in *Guettel* v. *United States* (1930), 67 Ct. Cls. 613, as to insurance policies unconditionally assigned to the insurer's wife. So in *Levy* v. *Commissioner* (1933, C. C. A. 2) 65 F. 2d. 412, one of the policies provided for the payment of an annuity to the insured's wife after his death, with no reservation of any control over it. The court held the value of this annuity was not covered by the statute. In *Anthracite Trust Co.* v. *Phillips* (1931, M. D. Pa.) 49 F. 2d. 910, there was the same result in the case of an ordinary policy with no rights reserved in the insured.

Following *Lewellyn* v. *Frick* (1925), 268 U. S. 238 therefore, this Court should avoid raising the constitutional question by adopting the interpretation of the statute which excludes this policy, and avoids any constitutional issue.

IV. The Congress cannot constitutionally tax interests which vested before it took effect.

This Court has discussed in a number of cases the effect of the Fifth Amendment upon the estate tax provisions of the various revenue acts, as well as its effect upon state succession taxes. In *Saltonstall* v. *Saltonstall* (1928), 276 U. S. 260, the settlor retained the power with one trustee to alter or terminate the trust. The Supreme Court held the trust property was validly taxed under the Massachusetts law since the tax was laid on the privilege of succession and the statute was not an attempt to tax a donor's estate for an absolute gift made when no tax was thought of. The tax was on the beneficiary.

Tyler v. *United States* (1930), 281 U. S. 497, much relied on by the Government and the Court of Claims in the case at bar, was really three cases. In each of them the decedent owned or paid for certain property, real or personal, which was then placed in the name of husband and wife as tenants by the entireties, with a strong suggestion that it was done in order to avoid inheritance taxes. The Supreme Court held that whatever the artificial rules of common law with respect to this peculiar estate, the death of one of the parties became the generating source of important and definite accessions to the property rights of the other. The effort to tax the inclusion of such an interest by the Revenue Acts was therefore not arbitrary, capricious or confiscatory. The same rule was applied to insurance policies in *Chase National Bank* v. *United States* (1929), 278 U. S. 327. In that case, while the beneficiaries were other than the decedent or his estate, the decedent retained the power to surrender and cancel the policies, to pledge them as security for loans, and to dispose of them and their proceeds for his own benefit during his life in such a way as to place the surrender value under control of any bankruptcy court to which he might be brought. The termination of the power of disposition at death was held to operate as an ef-

fective transfer, and therefore the Fifth Amendment was not violated.

On the other hand a very clear distinction is drawn in certain other cases, of which the strongest perhaps are those involving the Coolidge trust. *Nichols* v. *Coolidge* (1927), 274 U. S. 531, and *Coolidge* v. *Long* (1931), 282 U. S. 582. *Nichols* v. *Coolidge* was an attempt to include a trust in the gross estate for the purposes of the Federal estate tax. The Court of Claims in the case at bar said:

> "In the case of *Nichols* v. *Coolidge, supra*, also involving Section 402 (c) of the 1918 Act, the deeds conveyed absolute title to the real estate with covenants of warranty. The trust instrument reserved a life estate to the grantor and provided that the interest of any beneficiary predeceasing the grantor should pass as provided by the statute of distribution in effect at the time of the death of such survivor."

The Court of Claims drew the inference from this language that there was a title sufficiently vested in the beneficiary to pass at his death to his heirs or assigns. However, the Court is referred to the opinion of the Supreme Court of Massachusetts in which it passed upon the same trust in connection with the state inheritance tax (268 Mass. 443, 167 N. E. 757). It held the trust taxable, basing its decision upon these propositions:

> "The ultimate beneficiaries could not be determined with certainty until the death of both settlors. However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them might so predecease, could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate. The interest of the sons surviving the settlors in the trust fund did not

pass to them finally and irrevocably until and because of the death of both settlors."

The Supreme Court of the United States reversed this case in *Coolidge* v. *Long* (1931) 282 U. S. 582, holding that the condition consequent did not render the succession incomplete.

In the case of *Nichols* v. *Coolidge*, the application of the Federal estate tax to this trust was held arbitrary, capricious and confiscatory, because it was sought to include the value of property transferred prior to the passage of the Act. The State argued in the Supreme Court of the United States in this case that the tax could be hung upon the possibility of reverter to the settlors, but the Court rejected that position.

See also for a similar holding where the decedent had retained certain powers of control, *Reinecke* v. *Northern Trust Co.* (1929), 278 U. S. 339.

V. The transaction on March 2, 1912, was not a contingent gratuitous transfer intended to take effect in possession or enjoyment at the death of transferer.

In this respect the question is identical with that involved in many trust cases. In the case of *Heiner* v. *Grandin* (1930 C. C. A. 3) 44 F. 2d 141, 143, the court said:

> "Both of them, trusts and insurance policies, are taxed under the same section of the statute, but under different subsections. In no case has the Supreme Court said, or even intimated, so far as we have been able to discover, that a different principle applies in the taxation of trusts from that applied to the taxation of insurance policies, under Section 402 of the Act in question." (1918 Act).

For complete, and we believe accurate, reviews of the similar cases on trusts, we refer to *Safe Deposit Co.* v. *Tait*

(1934 D. Md.) 7 F. Supp. 40, affirmed in *Tait* v. *Safe Deposit Co.* (1935, C. C. A. 4) 74 F. 2d. 851; and *St. Louis Union Trust Co.* v. *Becker* (1935 C. C. A. 8) 76 F. 2d. 851.

The Federal estate tax is a tax on the transfer of property from the dead to the living, and not a tax upon the privilege of the living to succeed to the property of the dead. It is a transfer tax, not a succession or inheritance tax.

The Government and the Court of Claims relied largely on *Knowlton* v. *Moore* (1900), 178 U. S. 41, and quoted language indicating that a tax may be imposed upon the receipt of property by death. But the Court in this case was discussing the Act of June 13, 1898, which imposed a legacy tax, not one upon the net estate of the decedent. Under the more recent Revenue Acts it is the interest which ceased by reason of the death which is taxed. *Y. M. C. A.* v. *Davis* (1924), 264 U. S. 47.

Those transfers absolutely and irrevocably vesting the corpus in a beneficiary prior to the death of the settlor, and not made in contemplation of death, are not subject to the provisions of 302 (c) of the Revenue Act of 1926, even though they might be subject to tax under certain state inheritance tax laws.

The rights of the beneficiaries here were vested and took complete effect at the time the contract of insurance was amended in 1912. Prior to February 19, 1912, Mr. Green had certain rights defined by the policy. These he gave up for a contract in favor of certain third party beneficiaries. He could have had cash, but instead he made a present gift of a contract right, which so far as concerned him took effect at once, both in possession and enjoyment, by his wife, the beneficiary. Upon her death the right passed immediately and in the same amount to the three children. The right to cash did not mature until his death, but they

had the contract right in 1912, and at her death. *Tyler* v. *Treasurer* (1917), 226 Mass. 306, 115 N. E. 300.

The Government seeks to distinguish this case because of the existence of a possibility of reverter, and relies upon *Klein* v. *United States* (1931) 283 U. S. 231, and the cases following it. But in the case at bar the insured did not reserve any interest comparable to a fee, as was specifically provided in the *Klein* case. Instead, he placed the policy and its proceeds entirely out of his own control. As this Court said in *Coolidge* v. *Long* (1931), 282 U. S. 582:

> "The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of the actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time and nothing but his failure to survive the settlors could prevent it."

The effect of making this policy paid up in 1912 was not very different from the case of a transfer in trust to accumulate the income:

> "The fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend does not make the trust one intended to take effect in possession or in enjoyment at or after the grantor's death." *Shukert* v. *Allen* (1927) 273 U. S. 545, 548.

In *McCormick* v. *Burnet* (1931), 283 U. S. 784, the trust provided for its termination and the reversion to the donor if she survived the beneficiaries, who were her children. The Circuit Court of Appeals (1931, C. C. A. 7) 43 F. 2d. 277, had reversed the Board of Tax Appeals, distinguishing *May* v. *Heiner*, 281 U. S. 238, because of the possibility of reverter or contingent reversion. But this

Court reversed the Circuit Court of Appeals in a memorandum opinion on the authority of *May* v. *Heiner*.

For some reason which we cannot understand, both the Government counsel and the Court of Claims insist that there was not a contingent reversion in the *McCormick* case. We therefore refer to the trust instrument as it appears at 43 F. 2d, 278, note:

> "The trust estate hereby created shall in any and the latest event terminate upon the death of the last survivor of the three children of the said party of the first part, hereinbefore named . . .
>
> "Upon the termination of said trust as aforesaid, both in whole or in part, the trust estate as to which said trust shall be so terminated, shall be paid over and delivered to said party of the first part, if she shall then be living, and in the event that she shall not then be living, shall be paid over and distributed as follows:"

The court itself said (p. 279):

> "The last paragraph which we have quoted from the trust agreement calls for the payment of the trust estate to settlor in case she survived the beneficiaries."

Many courts have so construed the case. See *Safe Deposit Co.* v. *Tait*, 7 F. Supp. 40, 46; *Tait* v. *Safe Deposit Co.* (1935, C. C. A. 4) 74 F. 2d. 851, 857; *Becker* v. *St. Louis Union Trust Co.* (1935, C. C. A. 8) 76 F. 2d. 851, 858; *Commissioner* v. *Bonney* (1933), 29 B. T. A. 45, affirmed in (1935, C. C. A. 2) 75 F. 2d. 1008; *Commissioner* v. *Wallace* (1933), 27 B. T. A. 902, affirmed in (1934, C. C. A. 2) 71 F. (2d) 1002; cert. den. Oct. 15, 1934, 79 L. Ed. 110; *Helvering* v. *Helmholz* (1934, D. C. App.) 75 F. 2d. 245

The Solicitor General in his brief in the *Duke* case, cited below, said (p. 19):

"The *McCormick* case thus involved a limitation somewhat similar to that presented here, since the trust was to cease and determine when all three children died and Mrs. McCormick might survive them."

In *Helvering* v. *Duke* (1933) 290 U. S. 591, the same kind of contingent reversion existed as in this case, and the Board of Tax Appeals held the transfer was not intended to take effect in possession or enjoyment at death. (1931) 23 B. T. A. 1104. The case was affirmed (1933, C. C. A. 3) 62 F. 2d 1057, and affirmed in this Court by an equally divided court.

The same kind of reversion to the grantor in the event of the prior death of the beneficiary existed in *Commissioner* v. *Wallace,* to which we have just referred, in which this Court denied certiorari.

We submit that in the case at bar there were none of the features existing in some degree in all these other cases, whereby the grantor retained various kinds of control over the handling of the trust funds. The insured here had absolutely no interest in the proceeds of the policy unless and until a most unlikely event, entirely beyond his control, took place, namely, the death of his wife and of his three children before him.

So far as the *Klein* case is concerned, 283 U. S. 231, it was decided not so long after *May* v. *Heiner,* 281 U. S. 238. The Court was unanimous in both cases. In the *Klein* case it does not refer to or distinguish *May* v. *Heiner.* Clearly the Court must have regarded the situation in the two cases as markedly distinct. The only substantial difference is one long known to conveyancers. In one case a person may grant a life estate and reserve a fee but provide that if the life tenant survives the grantor, he shall have the fee. In the other case, he grants the life estate and the fee, but provides that if the life tenant and the grantee

of the fee predecease him, then the fee shall revert to him. It may be said that there is no difference in result. But nevertheless, the language is entirely different, the intent is different, and the legal effect is different. In *May* v. *Heiner* the grantor gave a life estate to one person, reserved a possible life estate to herself, and gave the corpus to someone else. In the *Klein* case the grantor gave the life estate to his wife but specifically reserved to himself the corpus, or, in other words, the fee simple. The interest of the wife in the fee was made contingent upon her surviving her husband. The difference in result again might not be so very substantial, but there is no question about the difference in the language, and there is equally no question that the difference in the legal effect resulted in taxing the one and not taxing the other as a part of the estate of the decedent. See also (1932) 32 Col. L. Rev. 1335; (1932) 81 U. of P. L. Rev. 937; (1932) 19 Va. L. Rev. 761.

VI. This transfer was not in contemplation of death, nor was it in any way testamentary in character.

The cases we have cited in the last section nearly all discuss and decide the question whether the transfer involved was made in contemplation of death. If, as we claim, this transaction was complete and vested in the beneficiaries in 1912, then clearly it was not done in contemplation of death. The Government, however, makes the claim that all life insurance is in contemplation of death, and in the Court of Claims asserted that life insurance taken out by a decedent on his own life and for which he pays all the premiums bears such a close and reasonable relationship to death that it is almost universally regarded as part of the estate which he "leaves" when he dies.

On the contrary, it is the general rule in the United States because of the fact that the absolute beneficiary's interest

is vested, that the gift of the policy is not testamentary in its nature. Vance, *Insurance* (2d. Ed. 1930) 558; *Hooker* v. *Sugg* (1889), 102 N. C. 919, 11 A. S. R. 717. English cases are no authority to the contrary, for in England the rule as to the vesting of the beneficiary's interest is not recognized at all, with one exception. Under the Married Women's Property Act (1882), the interest of the wife is as completely protected as under the New York statute. A twenty-payment tontine life policy of the same company, payable in exactly the same terms as Mr. Greene's, was held to create a trust so impregnable that the interest of the *cestui* could not be defeated by the insured by an assignment for benefit of creditors, and the company was ordered to issue a paid-up policy for the benefit of the children. *In re Equitable Life Assurance Soc.* (1911), 27 T. L. R. 213. Under the same rule the husband was prevented from taking the cash surrender option except for the benefit of the wife. *Re Fleetwood's Policy* (1926) Ch. 48. In both these cases there was a contingent reversion to the personal representatives of the husband if he survived.

VII. The measure of the tax if properly imposed at all could only be the actual value of the possibility of reverter, not the face value of the policy.

The statute itself only seeks to tax the "interest" transferred or terminated at death. This was no more than a contingent reversion, and the Government had the burden of showing its value. It made no effort to do so. It is a matter of judicial notice that the value of a reversion after the death of one's three children is worthless in this very practical field of taxation.

If the beneficiary were the mother of the insured, then the value of the policy to the insured would be considerable. *Haskell* v. *Equitable Life* (1902), 181 Mass. 341, 63 N. E.

899. On the other hand, Judge Chesnut, in *Safe Deposit Co.* v. *Tait* (1934, D. Md.), 7 F. Supp. 46, referring to the *McCormick* case, where the possibility was the same as here, a reversion after the death of three children:

> The contingent interest "was a very remote one and * * * so remote as to be really unsubstantial in the highly practical field of taxation."

Referring again to the Government's brief in the *Duke* case, we call attention to the note (p. 19):

> "The probability of the contingency happening in the *McCormick* case was much more remote than here. A parent has far less chance of surviving three children than of surviving one."

Conclusion.

We submit, therefore, that the petition for certiorari should be granted, because the question involved in this case is one of great public and general interest, in which the lower courts of the United States are in conflict, and which, because it is a question of Federal law, should be settled by the decision of the Supreme Court. The Court of Claims was in error because the life insurance policy involved belonged not to the decedent but to the beneficiaries named in the policy, from and after the date of its surrender for paid-up insurance in 1912. Either the Revenue Act of 1926 does not apply to the policy at all, or, if it does, is to that extent unconstitutional. The existence of a contingent reversion did not prevent the vesting in 1912 of the complete interest of the beneficiaries, and this possibility of reverter could only be taxed at its actual value, not at the face value of the policy belonging to others.

Whatever might be the public policy involved if this were an attempt on the part of the decedent by some roundabout means to effect a transfer to his family of as much of his

estate as possible, without having it depleted by estate taxes, there is no such policy involved in this case where many years before his death the decedent took out paid-up insurance which vested in the beneficiaries immediately. The effect was of a completed gift calling for no further contributions from the decedent, and absolutely out of his control. Such a policy should not be included in his estate, and this Court should grant the petition in order to reverse the Court of Claims and cure this unjust result.

Respectfully submitted,

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(6596-C)